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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

J.B.B. INVESTMENT PARTNERS, LTD et al., Plaintiffs and Respondents, v. R. THOMAS FAIR et al., Defendants and Appellants.	A152143 (San Mateo County Super. Ct. No. CIV522693)

Thomas Fair (Fair), Bronco RE Corporation (Bronco), BRE Boulevard LLC (Boulevard), and BRE Cameron Creek LLC (Cameron; collectively defendants) appeal from the trial court's order in favor of J.B.B. Investment Partners, Ltd. (JBB) and Silvester Rabic (Rabic; collectively plaintiffs), granting plaintiffs' special motion to strike defendants' cross-complaint, pursuant to the provisions of California's anti-strategic lawsuit against public participation (anti-SLAPP) statute (Code Civ. Proc., § 425.16).[1] Defendants contend the court erred in granting the motion because (1) certain claims in the cross-complaint did not arise from protected activity, and (2) defendants showed a probability of prevailing on the merits. We shall affirm the trial court's order granting the special motion to strike.

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

BACKGROUND[2]

Fair, an attorney and inactive member of the California State Bar, is the founder of Bronco, and Bronco is the managing member of Boulevard and Cameron. Boulevard and Cameron are Arizona limited liability companies formed in 2007, and they each own apartment units in Arizona. JBB is a limited partnership based in Atherton, California and Rabic is a nonattorney individual investor. In late 2007 and early 2008, JBB invested $150,000 and Rabic invested $100,000 in Boulevard and Cameron, and both became members of the limited liability companies.

Subsequently, plaintiffs asserted they had discovered that defendants had made various fraudulent representations and omissions, and the parties attempted to negotiate a settlement of their dispute. On July 4, 2013, Jack Russo, plaintiffs' counsel, sent a demand letter to Fair via email, in which a final settlement offer was made. On July 5, plaintiffs filed a lawsuit against defendants. Later that same day, Fair responded to Russo's demand letter by email, stating that he agreed to settle the matter. On August 6, plaintiffs filed a motion pursuant to section 664.6 to enforce the parties' settlement, which they purportedly entered into through email exchanges between Fair and counsel for plaintiffs. On August 15, defendants filed a motion to stay the action and compel arbitration, pursuant to the arbitration agreement contained in each limited liability company's operating agreement.

On October 18, 2013, following a hearing, the trial court granted plaintiffs' motion to enforce the settlement and denied defendants' motion to compel arbitration. On November 1, the court entered its judgment granting plaintiffs' motion to enforce the settlement. Also on November 1, the court entered a separate order denying defendants' motion to stay the action and compel arbitration.[3]

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[2] The factual and procedural background in this case is taken in part from our prior unpublished opinion in this case, *J.B.B. Investment Partners, Ltd. v. Fair* (A145221, Jan. 25, 2017).

[3] The court certified both its judgment enforcing the settlement and its order denying arbitration for interlocutory appeal under section 166.1.

On November 12, 2013, defendants filed a notice of appeal solely from the trial court's November 1 "Order on Motion to Enforce Settlement and Judgment Pursuant to [section 664.6]." On December 5, 2014, a panel of this Division found that "Fair's printed name on the document sought to be enforced as a settlement was not a signature." We therefore reversed the judgment enforcing the settlement. (*J.B.B. Investment Partners, Ltd. v. Fair*, *supra*, 232 Cal.App.4th at p. 978.)[4]

On April 20, 2015, plaintiffs filed a first amended complaint, alleging causes of action for securities fraud in violation of the California Corporations Code, fraud, breach of fiduciary duty, constructive fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory relief, promissory estoppel, rescission for fraud in the inducement, and legal malpractice. They also filed a motion for summary judgment. Also on April 20, defendants filed a second motion to stay the action and compel arbitration, based on the same arbitration clauses in the applicable operating agreements they relied on in the first motion to compel arbitration.

On May 15, 2015, following a hearing, the trial court denied defendants' motion to stay the action and compel arbitration, on the grounds that (1) the motion was "an untimely and improper request for reconsideration" of the prior order denying defendants' motion to compel arbitration, and (2) defendants had "engaged in extensive litigation activities which indicate a waiver of their right to arbitrate claims arising out of the alleged Operating Agreements."

Defendants appealed and on January 25, 2017, a panel of this Division affirmed the trial court's order denying the motion to compel arbitration. (*J.B.B. Investment Partners, Ltd. v. Fair*, *supra*, A145221.)

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[4] In light of this holding, we "express[ed] no opinion as to whether plaintiffs can enforce [their] July 4 offer [to settle] by another method, such as a motion for summary judgment for breach of contract." (*J.B.B. Investment Partners, Ltd. v. Fair*, *supra*, 232 Cal.App.4th at p. 991, fn. 4.) In the opinion, we also affirmed the consolidated cross-appeal by plaintiffs challenging the trial court's postjudgment order denying their motion for attorney fees. (*Id.* at pp. 977–978, 983.)

On April 12, 2017, defendants filed the cross-complaint that is at issue in this appeal, alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of Business and Professions Code section 17200, breach of fiduciary duty, negligent and intentional infliction of emotional distress, and false imprisonment. All causes of action were based on conduct by defendants related to the underlying litigation in this case, including the pre-litigation demand letter from plaintiffs' attorney regarding the possible terms of a settlement of the parties' dispute, plaintiffs' refusal to arbitrate the dispute, and plaintiffs' allegedly false statements to the trial court, which caused a bench warrant to be issued for Fair and which led to his purportedly false imprisonment.

On May 12, 2017, plaintiffs filed a special motion to strike, pursuant to section 425.16, directed to defendants' cross-complaint. On July 21, the trial court granted the motion in its entirety. The court also awarded plaintiffs $12,609 in attorney fees and costs, pursuant to section 425.16, subdivision (c)(1). Notice of entry of order was filed on July 26.

On August 4, 2017, defendants filed a notice of appeal from the court's order.

DISCUSSION

I. *The Anti-SLAPP Statute and Standard of Review*

Subdivision (b)(1) of section 425.16 provides that a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Subdivision (e) of section 425.16 elaborates the types of acts within the purview of the anti-SLAPP law, including, as relevant here, "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law [or] (2) any written or oral statement or writing made in connection with an issue under consideration or review by a

legislative, executive, or judicial body, or any other official proceeding authorized by law . . . ." (§ 425.16, subds. (e)(1) & (e)(2).)

"A two-step process is used for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff's complaint fits one of the categories spelled out in section 426.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 463 (*Hecimovich*), citing *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

" 'The Legislature enacted section 425.16 to prevent and deter "lawsuits [SLAPPs] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances." (§ 425.16, subd. (a).) Because these meritless lawsuits seek to deplete "the defendant's energy" and drain "his or her resources" [citation], the Legislature sought " 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target' " [citation]. Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation.' [Citation.]" (*Hecimovich, supra,* 203 Cal.App.4th at p. 463, quoting *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) Finally, subdivision (a) of section 425.16 expressly mandates that the statute "shall be construed broadly."

We review the trial court's ruling on a special motion to strike under section 425.16 de novo. (*Hecimovich, supra,* 203 Cal.App.4th at p. 464.)

II. *Whether the Cross-complaint's Causes of Action Arise from Protected Activity*

In its order granting plaintiffs' special motion to strike, the court observed that the facts underlying the cross-complaint and the claims asserted therein related almost entirely to the alleged wrongful act of filing and prosecuting this lawsuit and related

appeals. The court therefore concluded that "[b]ecause at least a portion (if not all) of each asserted claim involves petitioning-related activity, all the claims fall within [section 425.16.]"[5]

On appeal, defendants focus solely on two of the allegations in their cross-complaint, which they argue concern conduct falling outside of the activity protected under section 425.16. Specifically, defendants argue that (1) the July 4, 2013 demand letter, written by plaintiffs' attorney, amounted to criminal extortion as a matter of law and violated rule 5-100 of the California Rules of Professional Conduct (rule 5-100), and (2) plaintiffs' actions in causing Fair to be arrested and detained amounted to false imprisonment.[6] According to defendants, because this wrongful conduct underlies

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[5] The court cited *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287–1288, in which the appellate court stated that a "mixed cause of action is subject to section 425.16 if at least one of the underlying acts is protected conduct, unless the allegations of protected conduct are merely incidental to the unprotected activity. [Citation.]" More recently, our Supreme Court has explained that, at the first step in the anti-SLAPP analysis, "the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.)

[6] In the trial court, defendants had described the "basic allegations" of the cross-complaint as including, in addition to allegations related to the demand letter and alleged false imprisonment, allegations that plaintiffs "additionally breached the Operating Agreements [between the parties] by refusing Mr. Fair's demands to arbitrate the parties' dispute, and breached their Fiduciary Duties owed to [defendants] by filing the false and frivolous complaint." As the trial court stated, all of these allegations plainly arise from the protected activities related to filing and prosecuting a lawsuit against defendants. However, because defendants do not argue on appeal that any other allegations in the cross-complaint are not protected speech under section 425.16, we will limit our

numerous claims in the cross-complaint, the court improperly found that those claims arose from protected activity, pursuant to section 425.16.

In making these arguments, defendants rely on *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 (*Flatley*), in which the California Supreme Court concluded "that where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action."

A. *Demand Letter*

"Ordinarily, a demand letter sent in anticipation of litigation is a legitimate speech or petitioning activity that is protected under section 425.16." (*Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1293 (*Malin*), citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [" 'communications preparatory to or in anticipation of the bringing of an action or other official proceeding' " are protected by section 425.16]; accord, *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 886-887 (*Digerati*).) An exception to this rule exists where, as in *Flatley*, the demand letter is so extreme as to constitute criminal extortion as a matter of law. (See *Flatley*, *supra*, 39 Cal.4th at p. 333.)[7]

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discussion to the two claims raised on appeal involving the demand letter and plaintiffs' conduct leading to Fair's detention.

[7] The *Flatley* court defined "extortion" as "the threat to accuse the victim of a crime or 'expose, or impute to him . . . any deformity, disgrace or crime' (Pen. Code, § 519) accompanied by a demand for payment to prevent the accusation exposure, or imputation from being made." (*Flatley*, *supra*, 39 Cal.4th at p. 332, fn. 16.) In that case, our Supreme Court found that the attorney defendant's pre-litigation demand letter, which accused the plaintiff of rape and other unspecified crimes and threatened to report all crimes to the appropriate authorities and the media, constituted criminal extortion as a matter of law. In other words, the attorney's "communications threatened to 'accuse' [the plaintiff] of, or 'impute to him,' 'crime[s]' and 'disgrace' (Pen. Code, § 519, subds.

Here, the July 4, 2013 demand letter to Fair from Jack Russo, plaintiffs' attorney, stated in relevant part: "NO interest in your counter-offer for settlement, Tom, too little, too late, and I think the train has left (and certainly is leaving) the station[.] They are NOW more than ever convinced that you defrauded them, that you defrauded others, and that you have to be exposed for the Ponzi schemes you run[.] I say that because you have gone from one failure (Boulevard) to another (Cameron) to yet another fund-raising (Folio) and they are NOW convinced that your refusal to turn over all documents of ALL transactions is [be]cause you moved monies ILLEGALLY from Boulevard to support Cameron and now to get Folio started[.] YOUR CAREER IS ON THE LINE HERE, YOU MAY OR MAY NOT SEE IT THIS WAY BUT IN MY 33+ YEARS OF PRACTICE I HAVE SEEN FOLKS TALK THEIR WAY OUT OF ONE LAWSUIT BY ONE CLAIMANT, EVEN OUT OF TWO LAWSUITS BY TWO CLAIMANTS, BUT WE ARE TALKING NOW (SOON) THREE OR MORE LAWSUITS BY THREE OR MORE ADDITIONAL CLAIMANTS SO THIS IS THEIR LAST AND FINAL OFFER BEFORE ORDERS ARE OBTAINED FROM THE COURT THIS WEEK[.]

"1. You must represent and warrant (and provide full disclosure that) no monies moved illegally from one entity to another, they still do not understand how much money you pulled out of Boulevard or why that investment entirely failed (and full disclosure means turn over 100% of everything) and if this is a non-starter, it will confirm for them the Ponzi Scheme they NOW believe exists here and has existed for perhaps as long as Bernie Madoff got away with it. But that was discovered and eventually they all are so the day of reckoning is really at hand and if you feel 100% innocent you should disclose and disclose fully (and should have months ago)[.]

"2. You must enter a Stipulated Judgment for $350,000 which is the full bore amount of all amounts invested, all interest, all fees, all costs and everything else which

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(2), (3) unless [the plaintiff] paid [the attorney] a minimum of $1 million of which [the attorney] was to receive 40 percent." (*Flatley*, at pp. 329–330.)

Stipulated Judgment will be held in escrow and not entered if payment is timely made in accord with the next paragraph[.]"

The demand letter continued with several more terms of the agreement, including timing and conditions for staying all litigation pending Fair's payments and the filing of general releases and a waiver of claims.

The demand letter then stated: "9. All other forebearances [*sic*] set forth in the previous email to you including mutual non-disparagements, mutual confidentiality and the like will be part of the standard settlement paperwork, they will agree not to contact or otherwise respond to other claimants who inquire about the situation or about the Schuster Litigation or otherwise[.] ALL bets are off in this regard if you let this last settlement opportunity pass today[.]

"10. The Settlement Paperwork would be drafted in parallel with your full disclosure of all documents and all information as required by the first paragraph hereof[;] it is a material inducement to this settlement that you demonstrate that there is, IN FACT, not a Ponzi or Ponzi-like scheme at work here and the misrepresentations and non-disclosures of which they have complained are, in fact, simply at most a negligent mistake on your part—as was the failure to get signatures on the ACTUAL FULL-LENGTH LLC Operating Agreements AND at that time, you disclosed that 'priority' really has NO MEANING in the context of the 'priority payments' which they were promised[.]

"At bottom, they would rather have a jury determine that representing 'priority payments' would be made when NONE were paid is just outright fraudulent. . . . Trust me in this environment with the Bernie Madoffs of the world behind bars it is not hard for jurors to REQUIRE that over-disclosure occur and anything less is not just fiduciary breach but rather fraud and the type of fraud that cannot be discharged in bankruptcy[.] That is not really an option here so you should think carefully about whether you want to test your career in front of 12 honest, hard-working San Mateo citizens[.] It is your choice, this is their last offer[.] . . .

"WE require a YES or NO on this proposal, you need to say 'I accept' and I will work the balance of this holiday weekend to get the paperwork drafted[.] Anything less shifts all focus to the litigation and to the Court Orders we will seek now as well as in the future as well as the subpoenas we will serve on Folio and a hosts [*sic*][.] It is now up to you to decide whether you would rather resolve this amicably or not[.] Let me know your decision[.]"

First, as plaintiffs observe and as the court stated in its order granting the special motion to strike, defendants claimed in the trial court only that Russo's demand letter constituted a violation of rule 5-100.[8] They never alleged—either in their cross-complaint or their briefing in the trial court related to the motion to strike—that Russo's demand letter amounted to criminal extortion. Defendants thus have not preserved this issue for appeal. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226.)

We also observe that defendants have offered misleading quotes, taken out of context from the demand letter, to argue that Russo was threatening criminal prosecution for Fair's alleged Ponzi scheme if Fair did not agree to pay plaintiffs $350,000. In fact, Russo threatened no such thing. As the demand letter makes clear, he merely used strong language to make his point that unless Fair agreed to settle the matter, plaintiffs would file a lawsuit, which they believed would prove fraud on the part of Fair. This is a permissible pre-litigation tactic. (See *Flatley, supra*, 39 Cal.4th at p. 332, fn. 16 ["our opinion should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, whether verbal or written, that may include threats to file a lawsuit, report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion"].) Thus, even were we to address this issue, defendants have not shown that the demand letter was extortionate as a matter of law so as to fall within the narrow exception described in *Flatley*. (See *ibid.* [emphasizing that court's conclusion

[8] Rule 5-100(A) provides: "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute."

that defendant's "communications constituted criminal extortion as a matter of law [was] based on the specific and extreme circumstances of this case"]; see also *Malin*, *supra*, 217 Cal.App.4th at p. 1299 [attorney's demand letter, which made no overt threat to report plaintiff to prosecuting agencies or Internal Revenue Service, did "not fall under the narrow exception articulated in *Flatley* for a letter so extreme in its demands that it constituted criminal extortion as a matter of law"].) Cases cited by defendants do not show otherwise. (See, e.g., *Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405, 1423 [former employee's email to former employer constituted extortion as a matter of law where employee threatened to expose employer to federal authorities for unspecified crimes that violated False Claims Act unless employer negotiated a settlement of employee's claims]; *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, 806 [holding that anti-SLAPP statute did not apply to attorney defendant's demand letter because a "threat to report criminal conduct to enforcement agencies and to [plaintiff's] customers and vendors, *coupled with a demand for money*, constitutes 'criminal extortion as a matter of law' "].)

Second, as to the claim that Russo violated rule 5-100 when he sent the demand letter to Fair, the trial court stated in its order that "the allegation that Mr. Russo violated [rule] 5-100, an ethical rule governing attorneys, is not criminal conduct and does not bring this case within the *Flatley* exception." We agree with this conclusion. (See, e.g., *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 806 [in *Flatley*, court's "use of the phrase 'illegal' was intended to mean criminal, and not merely violative of a statute"]; *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1169 [holding, consistent with several other Court of Appeal opinions, that "the rule from *Flatley* . . . is limited to criminal conduct" and that "[c]onduct in violation of an attorney's duties of confidentiality and loyalty to a former client cannot be 'illegal as a matter of law' " for purposes of the *Flatley* exception].) We also agree with the trial court's additional statement that the cross-complaint's allegations did not even appear to involve any violation of rule 5-100. As we have already explained, and as the plain language of the demand letter makes clear, Russo threatened to expose Fair's alleged

fraud in *civil litigation* if the parties did not settle, *not* by "present[ing] criminal, administrative, or disciplinary charges" against him "to obtain an advantage in a civil dispute." (Rule 5-100(A).)

For these reasons, we conclude the July 4, 2013 pre-litigation demand letter constitutes speech or petitioning activity, protected under section 425.16, subdivision (e)(2). (See *Malin*, *supra*, 217 Cal.App.4th at p. 1294.)

B. *False Imprisonment*

As with the demand letter, defendants rely on *Flatley* to argue that plaintiffs' illegal conduct in asking the court to issue a bench warrant against Fair when he failed to appear for his scheduled judgment debtor's examination (order of examination or OEX) caused him to be falsely imprisoned, and is not protected activity under the anti-SLAPP statute. (See *Flatley*, *supra*, 39 Cal.4th at p. 321.)

During the pendency of the first appeal in this matter, defendants did not post a bond and plaintiffs proceeded with collection activities. On April 18, 2014, the trial court issued an order for Fair to appear on July 2, 2014. On June 3, after the parties unsuccessfully negotiated a postponement of the OEX date, the order was served on Fair. On June 16, the court denied Fair's motion for a protective order to delay the OEX. On June 23, Fair's counsel sent a letter to defendants' counsel stating that Fair would not appear for the scheduled OEX and that the date would have to be changed to the week after Fair returned from a trip abroad. The parties again attempted and failed to negotiate a compromise in rescheduling the OEX. On June 30, after defendants informed plaintiffs that Fair would not appear on July 2, the noticed date, plaintiffs responded that they would appear in court on July 2, and seek "all appropriate remedies under applicable law . . . ." On July 2, neither Fair nor his counsel appeared in court for the OEX and plaintiffs requested a bench warrant.[9] The court then issued a civil bench warrant for

[9] Although defendants state in their opening brief that "Fair accepted [plaintiffs'] offer to conduct the OEX several days after his return to the country in August 2014," they do not cite to any evidence in the record that supports this statement. The evidence in the record shows, to the contrary, that although the parties negotiated about changing

Fair, who was detained for two hours on July 31 at San Francisco International Airport, upon his return from a vacation.

Defendants' one-sentence argument on this point is that plaintiffs' "purposeful material misrepresentations and non-disclosures to the trial court, intended to lead to . . . Fair's false imprisonment[,] are not protected by the anti-SLAPP statute." The only case defendants rely on in support of this argument is *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 706, in which the appellate court held that "[f]iling a false criminal complaint is an illegal activity, not a constitutionally protected exercise of the right of petition or free speech." The court also stated that the Civil Code section 47 litigation privilege "is simply not transferrable to the anti-SLAPP statute because the latter statute does not promote the same goals as the former." (*Lefebvre*, at p. 705.) *Lefebvre* is inapposite because defendants in this case did not present evidence showing plaintiffs had committed an illegal act when they requested a bench warrant. As noted, the trial court stated in its order granting the special motion to strike that defendants "offer[ed] no evidence corroborating their claim that plaintiffs agreed to postpone the OEX, nor any evidence plaintiffs made any false statement(s) to the court." Plaintiffs' conduct in this case is simply not comparable to that of the defendant in *Lefebvre*, who admittedly filed a false criminal complaint against her ex-husband. (See *ibid.*) Moreover, unlike the defendant in *Lefebvre*, plaintiffs in this case are not attempting to conflate section 425.16 and Civil Code section 47, but instead—in this first step of the anti-SLAPP analysis—are arguing, correctly, that their conduct leading to Fair's detention was protected activity under section 425.16. (Compare *Lefebvre*, at p. 705.)

The issuance of the bench warrant resulted from the parties' failed attempt to reach a compromise agreement that would postpone the date of Fair's OEX. Defendants have failed to demonstrate that plaintiffs gave untruthful information to the court to cause

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the date of the OEX, no agreement was ever reached. Indeed, in its order striking the cross-complaint, the trial court noted that defendants had offered no evidence corroborating their claim that plaintiffs had agreed to postpone the OEX.

Fair's false imprisonment. We therefore reject defendants' cursory argument that the *Flatley* exception for illegal conduct applies to the claims in the cross-complaint related to the alleged false imprisonment. (See *Flatley*, *supra*, 39 Cal.4th at p. 321.) Plaintiffs' conduct in requesting the bench warrant was protected speech under section 425.16, subdivision (e)(1).

III. *Defendants' Probability of Prevailing on the Merits*

Turning to the second step in the anti-SLAPP analysis, we agree with the trial court that defendants have not satisfied their burden of demonstrating a probability of prevailing on the merits of the claims in their cross-complaint. (See § 425.16, subd. (b)(1); *Hecimovich*, *supra*, 203 Cal.App.4th at p. 463.) That is because all of the claims in the cross-complaint are protected by the litigation privilege. (See Civ. Code, § 47, subd. (b)(2) ["A privileged publication or broadcast is one made . . . [¶] . . . [¶] [i]n any . . . judicial proceeding"]; see also *Digerati*, *supra*, 194 Cal.App.4th at p. 888 ["A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim"].)

"The litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a 'publication or broadcast' made as part of a 'judicial proceeding' is privileged. This privilege is absolute in nature, applying 'to *all* publications, irrespective of their maliciousness.' [Citation.] 'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action.' [Citation.] The privilege 'is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.' [Citation.]

" 'The principal purpose of [the litigation privilege] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]' [Citation.] In order to achieve this purpose of curtailing derivative lawsuits, we have given the litigation

privilege a broad interpretation. . . ." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241 (*Action Apartment Assn.*).)

"To be protected by the litigation privilege, a communication must be 'in furtherance of the objects of the litigation.' [Citation.] . . . [Citation.] A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration. [Citations.]" (*Action Apartment Assn., supra*, 41 Cal.4th at p. 1251.)

Our Supreme Court has found that the litigation privilege applies to claims of false imprisonment. In *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 375, the court rejected the plaintiff's argument that the tort of false imprisonment should be an exception (along with malicious prosecution) to the bar to civil liability for tort claims based on privileged communications under Civil Code section 47, subdivision (b), holding that a citizen's report to police regarding the suspected criminal activity of another person was privileged under that section. (*Hagberg*, at p. 375.)

Here, in its order granting plaintiffs' special motion to strike the cross-complaint, the trial court found, with respect to this second step in the anti-SLAPP analysis, that "the asserted claims are barred by [the] litigation privilege codified in [Civil Code section 47, subdivision (b)]. Oddly, in arguing a probability of prevailing on the merits, defendants do not even address the litigation privilege, despite it being plaintiffs' primary argument as to why the claims fail on the merits. Although the cross-complaint includes non-tort claims (breach of contract-related claims) to which the litigation privilege typically has a much more limited application, even the contract-based claims are, on their face, based primarily on the act of filing, litigating, and making statements in this lawsuit, which is presumptively privileged activity. [Citations.] [¶] The fact that plaintiffs sent their July 4, 2013 settlement offer email . . . one day before the lawsuit [was filed] does not change the analysis, because pre-lawsuit offers/negotiations are also protected by the litigation privilege. [Citations.] Plaintiffs' pre-suit settlement offer(s) proposing a refund [of] their

investments in the LLCs was part of on-going settlement discussions, and thus is privileged. [Citations.]"[10]

In *Digerati, supra*, 194 Cal.App.4th at pages 887–888, a case with similarities to the present matter and also involving a cross-complaint, the appellate court first found, with respect to the first step of in the anti-SLAPP analysis, that certain pre-litigation statements made by the cross-defendants through their attorney to the cross-plaintiff and others concerned the subject of the dispute between the parties and were made in anticipation of a lawsuit by the cross-defendants against the cross-plaintiff and others. The cross-defendants' pre-litigation statements were thus protected speech under section 425.16, subdivision (e)(2). (*Digerati*, at p. 888.) The court also found that the cause of action for breach of the implied covenant of good faith and fair dealing arose from the filing of an application for a temporary restraining order and a motion for a preliminary injunction, which constituted protected activity under subdivision (e)(1) of section 425.16. (*Digerati*, at p. 888.)

The court then addressed the second step of the anti-SLAPP analysis, finding that the cross-plaintiff could not establish a probability of prevailing on the merits because the litigation privilege precluded the cross-defendants' liability on the claims in the cross-complaint. As the court explained, "the record establishes as a matter of law that the alleged prelitigation statements on which the count for breach of the implied covenant is based related to litigation that was contemplated in good faith and under serious consideration at the time the statements were made, for the same reasons stated above [regarding the first step under section 425.16]. We also conclude that the filing of an application for a temporary restraining order and a motion for preliminary injunction

[10] The court then found that even if the litigation did not apply to the contract-based claims, those claims failed for other reasons. Because we, like the trial court, conclude the litigation privilege *does* apply to all claims, we need not address this secondary ground for finding no probability that defendants would prevail on the merits. We also note that, as in the trial court, defendants have not addressed the applicability of the litigation privilege to the second step of the anti-SLAPP analysis in their briefing on appeal.

involved statements made by litigants in judicial proceedings, logically related to the action, and to achieve the objects of the litigation. We therefore conclude that these statements made prior to or in the course of litigation were protected by the litigation privilege." (*Digerati*, at p. 889, fn. omitted.)

Likewise, in the present case, the record establishes as a matter of law that all claims in the cross-complaint, including those related to the prelitigation demand letter, the claimed false imprisonment, and both the tort- and the contract-based causes of action, were protected by the litigation privilege. (See Civ. Code, § 47, subd. (b).) The demand letter was "related to litigation that was contemplated in good faith and under serious consideration at the time the statements were made" and all of the other litigation-related activity, including the request for a bench warrant, "involved statements made by litigants in judicial proceedings, logically related to the action, and to achieve the objects of the litigation." (*Digerati*, *supra*, 194 Cal.App.4th at p. 889; see also *Action Apartment Assn.*, *supra*, 41 Cal.4th at p. 1251; *Hagberg v. California Federal Bank*, *supra*, 32 Cal.4th at p. 375.)

The trial court properly granted the special motion to strike. (See *Hecimovich*, *supra*, 203 Cal.App.4th at p. 463.)[11]

[11] Plaintiffs request that we "also affirm the award of attorney's fees that was not challenged by [defendants] and award [plaintiffs] their fees and costs on this appeal." (See § 425.16, subd. (c)(1) [with exceptions not relevant here, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs"]; see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131 [under section 425.16, subdivision (c), "any SLAPP defendant who brings a successful motion to strike is entitled to mandatory attorney fees"].) Defendants have not directly attacked the mandatory attorney fees award made in the trial court, which will remain in place in light of our affirmance of the court's order. Moreover, because the issue of attorney fees on appeal has not been fully briefed, we will remand the matter to the trial court with directions to address this issue. (Cf. *Malin*, *supra*, 217 Cal.App.4th at p. 1304 [remanding matter with direction to trial court to consider attorney fees issue].)

DISPOSITION

The order granting plaintiffs' special motion to strike defendants' cross-complaint is affirmed. Costs on appeal are awarded to plaintiffs. The matter is remanded to the trial court with directions to determine the attorney fees to which plaintiffs are entitled for fees incurred on appeal.

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Kline, P.J.

We concur:

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Richman, J.

_____
Stewart, J.

J.B.B. Investment Partners, LTD et al. v. Fair et al. (A152143)